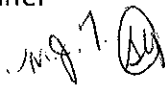




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**MEMORANDUM**

To: Department Heads  
Title VI Personnel

From: M. J. Thomas   
Director, Title VI Compliance Program

Re: Title VI State Policy Guidance #11-02: LEP National Origin Policy

Date: June 6, 2011

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2. Purpose and Application
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**I. Introduction**

Tennessee statutory law charges the Tennessee Human Rights Commission with several responsibilities and duties, to include but not limited to the following: 1) to search for interdepartmental gaps, inconsistencies and inefficiencies in the implementation of a comprehensive state policy and 2) to serve as the central coordinating agency for executive branch departments and agencies for technical assistance, consultation and resources to encourage and assist compliance with the requirements of Title VI. One requirement of Title VI which warrants a coordinated strategy or statewide approach is in the area of national origin discrimination. This policy addresses recipient responsibilities to limited English proficient (LEP) persons pursuant to Title VI of the Civil Rights Act of 1964 and the Tennessee Human Rights Commission's implementing regulations.

There are many individuals for whom English is not their primary language. If these individuals have a limited ability to read, write, speak, or understand English, they are limited English proficient, or "LEP." Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, et seq. and its implementing regulations provide that no person shall be subjected to discrimination on the basis of race, color, or national origin under any program or activity that receives federal financial assistance. Language for LEP individuals can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information provided by federally funded programs and activities.

In certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from federally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d and Title VI regulations against national origin discrimination. To the extent additional clarification is desired on the obligation under Title VI to ensure meaningful access by LEP persons and how recipients can satisfy that obligation, a recipient should consult the Tennessee Human Rights Commission Title VI Compliance Program.

## **II. Purpose and Application**

The purpose of this policy guidance is to clarify the responsibilities of executive branch departments ("recipients") and their respective subrecipients within the State of Tennessee which receive Federal financial assistance, and assist them in fulfilling their responsibilities to LEP persons. Recipients must take reasonable steps to ensure that persons have meaningful access to the programs, services and information provided by recipients in order to avoid discrimination on the grounds of national origin.

This policy guidance provides an analytical framework that recipients may use to determine how best to comply with statutory and regulatory obligations to provide meaningful access to the benefits, services, information and other important portions of their programs and activities for individuals who are LEP. Title VI implementing regulations of the Tennessee Human Rights Commission prohibit both intentional discrimination and policies and practices that appear neutral but have a discriminatory effect. Thus, a recipient's policy or practices regarding the provision of benefits and services to LEP persons need not be intentional to be discriminatory, but may constitute a violation of Title VI if they have an adverse effect on the ability of national origin minorities to meaningfully access programs and services.

Recipient entities have considerable flexibility in determining how to comply with their legal obligation in the LEP setting; however, recipient entities must establish and implement policies and procedures for providing language assistance sufficient to fulfill their Title VI responsibilities and provide LEP persons with meaningful access to services.

### III. Legal Authority

Tennessee law provides that "[i]t is a discriminatory practice for any state agency receiving federal funds making it subject to Title VI of the Civil Rights Act of 1964, or for any person receiving such federal funds from a state agency, to exclude a person from participation in, deny benefits to a person, or to subject a person to discrimination under any program or activity receiving such funds, on the basis of race, color, or national origin." T.C.A. §4-21-904 (See also Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S. C. 2000d). Rules and regulations governing the Tennessee Human Rights Commission Title VI Compliance Program forbid recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." THRC Rule 1500-01-03-.03(2)(b).

The United States Supreme Court, in *Lau v. Nichols*, 414 U.S. 563 (1974), interpreted regulations promulgated by the former Department of Health, Education, and Welfare, including a regulation similar to that of DOJ, 45 CFR 80.3(b)(2), to hold that Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national-origin discrimination. In *Lau*, a San Francisco school district that had a significant number of non-English speaking students of Chinese origin was required to take reasonable steps to provide them with a meaningful opportunity to participate in federally funded educational programs. In light of U. S. Supreme Court case law and applicable Title VI regulations, the State of Tennessee recognizes the need for consistent application of Title VI LEP obligations by requiring recipients to develop an LEP plan and/or policy.

According to THRC Rule 1500-01-03-.08(3)(a)(6), the Title VI Implementation Plan submitted by executive branch departments and agencies shall include an LEP policy and the procedure that an entity follows when confronted with circumstances where language assistance is required. The LEP plan or procedures shall include a list of translator services utilized by the department or agency and identify various languages encountered by the department as a result of on-site or telephonic encounters from the public.

### IV. Policy Guidance

#### 1. Who is covered?

Executive branch departments and agencies within the State of Tennessee, and their respective subrecipients which receive Federal financial assistance, either directly or indirectly, through a grant, cooperative agreement, contract or subcontract are covered by this policy guidance. Title VI applies to all Federal financial assistance, which includes but is not limited to

awards and loans of federal funds, awards or donations of federal property, details of federal personnel, or any agreement, arrangement or other contract that has the provision of assistance as one of its purposes.

Title VI prohibits discrimination in any program or activity that receives Federal financial assistance. In most cases, when a recipient receives Federal financial assistance for a particular program or activity, all operations of the recipient are covered by Title VI, and not just the part of the program that uses the federal assistance. Thus, all parts of the recipient's operations would be covered by Title VI, even if the federal assistance were used only by one part.

## 2. Who is a Limited English Proficient Individual?

Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be limited English proficient, or "LEP," entitled to language assistance with respect to a particular type of service, benefit, or encounter.

## 3. Basic Requirement: All Recipients Must Take Reasonable Steps To Provide Meaningful Access to LEP Persons

### Determining the extent of the recipient's obligation to provide LEP services

To determine the extent of the obligation to provide LEP services, executive branch departments and agencies subject to Title VI are required to take reasonable steps to ensure meaningful access to its programs and activities by LEP persons. This is accomplished by taking an individualized assessment which applies the following four (4) factors to the various kinds of contacts that a recipient has with the public to assess language needs and decide what reasonable steps it should take:

1. The Number or Proportion of LEP Persons Served or Encountered in the Eligible Service Population
  - a. This population will be program-specific.
2. The Frequency With Which LEP Individuals Come in Contact With the Program
  - a. Even when a recipient serves LEP persons on an unpredictable or infrequent basis, a plan may be as simple as being prepared to use a telephone interpreter line to obtain immediate interpreter services.
3. The Nature and Importance of the Program, Activity, or Service Provided by the Program
  - a. Determine whether denial or delay of access to services or information could have serious or even life threatening implications for the LEP individual.

4. The Resources Available to the Recipient and Costs
  - a. Explore cost-effective means of delivering competent and accurate language services before limiting services due to resources.
  - b. Articulate in documentation the process for determining that language services would be limited based on resources or costs.

Each recipient must have on file documentation to support that it has taken an individualized assessment to determine its LEP obligations. Documentation may include but is not limited to the following:

1. Data showing the number and percentage of LEP persons served by agency programs in the eligible service population; and,
2. Data showing the number and percentage of LEP persons actually served by agency programs (state and federally funded).

#### Oral (Interpretation) and Written (Translation) Language Services

There are two (2) main ways to provide language services: oral (interpretation) and written (translation).

Interpretation is the act of listening to something in one language and orally translating it into another language. The provision of oral language services may include the following: hiring bilingual staff; hiring staff interpreters; contracting for interpreters; using telephone interpreter lines; using community volunteers; and in certain instances, utilizing family members and/or friends of the individual requiring oral language services, where permissible.

- When interpretation is needed and is reasonable, such services should be provided in a *competent* and *timely* manner. For example, the quality of services is significant in a healthcare setting when compared to services provided at a bicycle safety class.
- When interpretation is *necessary*, recipients should generally offer competent interpreter services at no cost to the LEP person.

Translation is the replacement of a written text from one language into an equivalent written text in another language. After applying the four factor analysis, a recipient may determine that an effective LEP plan includes the translation of vital written materials into the languages of each frequently-encountered LEP group eligible to be served and likely to be affected by the recipient's program. Vital written materials could include: consent and complaint forms, notices advising LEP persons of free language assistance, written notices of rights, denial, loss, or decreases in benefits or services; and applications to participate in a federally funded program or activity or to receive benefits or services.

Whether a document is vital may depend upon the importance of the program, information, encounter, or service involved and the consequences to the LEP person if the information in question is not provided accurately or in a timely manner. Recipients are encouraged to create a plan for consistently determining, over time and across various activities, what documents are "vital" to the meaningful access of the LEP population served.

- The extent of a recipient's obligation to provide written translations of documents should be determined on a case-by-case basis.
- Awareness of rights or services is an important part of "meaningful access."

Safe harbor guidelines, which apply exclusively to the translation of written documents, state that if a recipient provides written translations under the "safe harbor" circumstances outlined by various federal departments and agencies, such action will be considered strong evidence of a recipient's compliance with written translation obligations. See Department of Justice (DOJ) Policy Guidance titled "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons," published at 67 FR 41455, 41457- 41465 (June 18, 2002) (DOJ Recipient LEP Guidance).

#### Developing an effective LEP Plan or Procedures

After determining what language services are appropriate, the recipient should develop an effective LEP plan. An "LEP Plan" is not required, but the absence of a plan does not obviate the requirement to ensure meaningful access. Elements of an effective LEP plan or procedures include the following:

##### 1) Identification of LEP individuals

- a) A department or agency may satisfy this element by:
    - i) Utilizing translation cards provided by the language assistance state contractor or other organizations or entities that offer language assistance services.
    - ii) Keeping records of the various languages confronted by the department or agency as a result of on-site and telephonic contact with the public.
    - iii) Posting notices in frequently encountered languages notifying LEP persons of language assistance.
- **The following measures listed above should be employed by a department or agency and documented in a manner that all employees are aware of and are able to direct LEP individuals in an appropriate fashion. Under appropriate circumstances and when relevant, a department should consider creating an option on the department's voicemail to hear the recording in another language.**

##### 2) Language assistance measures

- a) Publish a list of employees that are designated to provide language assistance.
  - b) Establish procedures that staff must follow to access language line services or to direct persons to the appropriate staff member(s).
- **Departments and agencies must have documentation to verify that its staff has been informed of and has access to the department's language assistance procedures.**
- 3) Training to ensure that staff understands the obligation to provide meaningful access to services
  - 4) Providing Notice to LEP persons
    - a) Notice of fair treatment and/or notice of right to file a complaint in another language
  - 5) Monitoring and Updating the LEP Plan
    - a) Departments and agencies should have a process for determining whether changes in demographics, types of services or other needs require annual reevaluation of its LEP Plan.

## **V. Compliance and Enforcement**

State of Tennessee Title VI laws and regulations provide that the Tennessee Human Rights Commission will verify that all state governmental entities that are recipients of Federal financial assistance comply with Title VI of the Civil Rights Act of 1964. If there appears to be a failure or threatened failure of any recipient to comply with Title VI regulations and if the noncompliance or threatened noncompliance cannot be corrected by informal means in conjunction with the responsible State official who is the executive branch department head, then the Tennessee Human Rights Commission shall report its findings and recommendations to the governor and to each member of the general assembly.

In determining a recipient's compliance with Title VI, the primary concern is to ensure that the recipient's policies and procedures overcome barriers resulting from language differences that would deny LEP persons a meaningful opportunity to participate in and access programs, services, and benefits. A recipient's appropriate use of the methods and options discussed in this policy guidance will be deemed by the Tennessee Human Rights Commission as evidence of a recipient's willingness to comply voluntarily with its Title VI obligations.